IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. DILORETO and JEANNE DILORETO, h/w	:	CIVIL ACTION
v.	:	
CNA INSURANCE COMPANY, SHIHADEH CARPETS, INC., SHIHADEH CARPET, RUGS, WOOD, VINYL, and PETER L. SHIHADEH	:	NO. 98-3488

MEMORANDUM AND DECLARATORY JUDGMENT

HUTTON, J. January 20, 2000

Presently before the Court is Defendant's Motion for Summary Judgment, Plaintiffs' Motion for Summary Judgment, and the Parties' oppositions thereto. For the reasons stated below, the Court grants Defendant's Motion and denies Plaintiffs' Motion.

I. BACKGROUND

This is an insurance coverage case. Plaintiffs Richard and Jeanne DiLoreto filed a complaint in the Court of Common Pleas of Chester County against the Defendants Shihadeh Carpets, Inc., Shihadeh Carpet, Rugs, Wood, and Vinyl, and Peter Shihadeh ("Shihadeh"). Said complaint arises out of alleged damage caused to various rugs which the Plaintiffs contracted Shihadeh to clean and/or cut. Subsequently, the DiLoretos filed another complaint in the Court of Common Pleas of Chester County seeking a Declaratory Judgment, pursuant to Pennsylvania's Declaratory Judgment Act. See

42 Pa. C.S.A. § 7531. In said complaint Plaintiffs claim that Defendant Transcontinental Insurance Company[1] ("Transcontinental") has a duty to defend and indemnify its insured under the terms of Shihadeh's commercial liability policy. Defendant Transcontinental removed this declaratory judgment complaint to this Court based upon diversity jurisdiction.

II. STANDARD OF REVIEW

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a

[1] In the declaratory judgment complaint, Plaintiffs incorrectly named CNA Insurance Company as a defendant. The correct defendant is Transcontinental Insurance Company.

reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Standard of Review for Insurance Policies

An insurer owes a duty to defend an insured whenever the allegations in a complaint, taken as true, set forth a claim which potentially falls within the coverage of the policy. See Visiting Nurse Ass'n of Greater Phila. v. St. Paul Fire & Marine Ins. Co., 65 F.3d 1097, 1100 (3d Cir. 1995); Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484, 487 (Pa. 1959); Germantown Ins. Co. v. Martin, 407 Pa. Super. 326, 595 A.2d 1172, 1174 (Pa. Super. Ct. 1991). The insurer has the burden of establishing the applicability of an exclusion. See Allstate Ins. Co. v. Brown, 834 F. Supp. 854, 857 (E.D. Pa. 1993). An insurer owes a duty to

indemnify an insured only if liability is established for conduct which actually falls within the scope of the policy coverage. See Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 831 n.1 (3d Cir. 1995). The insured has the burden to establish coverage under an insurance policy. See Erie Ins. Exch. v. Transamerica Ins. Co., 516 Pa. 574, 533 A.2d 1363, 1366-67 (Pa. 1987); Benjamin v. Allstate Ins. Co., 354 Pa. Super. 269, 511 A.2d 866, 868 (Pa. Super. Ct. 1986).

The principles governing the interpretation of an insurance contract under Pennsylvania law are well settled. See Altipenta, Inc. v. Acceptance Ins. Co., No. CIV.A.96-5752, 1997 WL 260321, at *2 (E.D. Pa. May 14, 1997), aff'd, 141 F.3d 1153 (3d Cir. 1998) (unpublished table decision). The court generally performs the task of interpreting an insurance contract. See Allstate, 834 F. Supp. at 856. The court must read the policy as a whole and construe it according to the plain meaning of its terms. See Bateman v. Motorists Mut. Ins. Co., 527 Pa. 241, 590 A.2d 281, 283 (Pa. 1991). In determining whether a claim falls within the scope of coverage, the court compares the language of the policy and the allegations in the underlying complaint. See Gene's Restaurant, Inc. v. Nationwide Ins. Co., 519 Pa. 306, 548 A.2d 246, 246-47 (Pa. 1988); Biborosch v. Transamerica Ins. Co., 412 Pa. Super. 505, 603 A.2d 1050, 1052 (Pa. Super. 1996).

Whether the provisions of a contract are clear and unambiguous is a matter of law to be determined by the court. See Allegheny Int'l Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1424 (3d Cir. 1994). "A term is ambiguous if reasonable people, considering it in the context of the entire policy, could fairly ascribe different meanings to it." See Altipenta, Inc., 1997 WL 260321, at *2; see also Northbrook Ins. Co. v. Kuljian Corp., 690 F.2d 368, 372 (3d Cir. 1982); United Servs. Auto. Ass'n v. Elitzky, 358 Pa. Super. 362, 517 A.2d 982, 986 (Pa. Super. Ct. 1986). If a provision is ambiguous, it is construed against the insurer as the drafter of the agreement. See Lazovick v. Sun Life Ins. Co. of Am., 586 F. Supp. 918, 922 (E.D. Pa. 1984). Nevertheless, a court should not torture the language of a policy to create ambiguities. See Eastern Assoc. Coal Corp. v. Aetna Cas. & Surety Co., 632 F.2d 1068, 1075 (3d Cir. 1980).

III. DISCUSSION

A. Insurance Coverage

Plaintiffs in this matter claim coverage exists for Shihadeh's allegedly defective or faulty cleaning and cutting under an existing commercial liability policy. Specifically, Plaintiffs claim that said coverage is required pursuant to the "Mercantile Program Extension Endorsement" of Shihadeh's "Building and Personal Property Coverage" policy which states that coverage is extended to damage to "[p]ersonal property of others in your care, custody or

control. The most we will pay for loss or damage caused by a **Covered Cause of Loss** under this Coverage Extension is $15,000 at each described premises." (See Mercantile Extension ¶ b(2) (emphasis added)). Although, such provision appears to initially support Plaintiffs' position that coverage exists, after reviewing the morass of exclusions, extensions, and conditions within the policy, the Court finds that Plaintiffs do not fall within the scope of the policy's coverage.

First, Plaintiffs clearly have no claim against Shihadeh's policy under the scope of the "Commercial General Liability Coverage Form" as Paragraph 2(m) clearly and unambiguously excludes " '[p]roperty damage' to 'impaired property'[2] . . . arising out of (1) [a] defect, deficiency, inadequacy or dangerous condition in 'your work product' or 'your work' . . . ." The term "your work" as used in the above policy exclusion in unambiguous in its meaning and clearly applies to the services performed by Shihadeh for Plaintiffs. As such, any claim against Shihadeh for defective or faulty cleaning and cutting is clearly and unambiguously excluded by Shihadeh's "General Liability Coverage."

[2] Impaired property is defined as "tangible property, other than 'your product' or 'your work' that cannot be used or is less useful because: (a) it incorporates 'your product' or 'your work' that is know or thought to be defective, deficient, inadequate or dangerous . . . ." (See General Liability Form at Section V(7)). Plaintiffs' claim Shihadeh improperly cleaned and cut their rugs causing a substantial reduction in value. Thus, such facts fit squarely into the definition of "impaired property."

As a result of such exclusion, Plaintiffs claim coverage under the "Building and Personal Property Coverage" policy as modified by the "Mercantile Program Extension Endorsement." However, as per the unambiguous language of Paragraph b(2) in said exclusion, coverage is only applicable when the loss claimed is the result of a "Covered Cause of Loss." (See Mercantile Extension ¶ b(2)).

Reviewing the Contract further, Shihadeh's policy contains a "Cause of Loss - Special Form" which defines the meaning of "Cause of Loss" under the "Mercantile" extension and the commercial insurance policy. (See Cause of Loss ¶ A). As per the "Cause of Loss - Special Form" exclusion section, certain types of losses are excluded from the definition of "Cause of Loss." Such exclusions apply to, inter alia, any loss or damage caused by any faulty, inadequate, or defective:

> (1) Planning, zoning, development, surveying, siting;
> (2) Design, specifications, workmanship, repair, construction, renovation, remolding, grading, compaction;
> (3) Materials used in repair, construction, renovation or remodeling; or
> (4) Maintenance
>
> of part or all of any property on or off the described premises.

(See Cause of Loss ¶ B(3)(c)). Plaintiffs do not contest the existence of the above stated exclusion, rather they maintain that such language refers only to "construction" related activities and is therefore inapplicable to the present matter. The Court,

however, finds that such a reading of this exclusionary clause is patently unreasonable.

Plaintiffs attempt to group exclusions (1)-(4) into a broad category of "construction" related activities. First, Plaintiffs provide no basis for such a conclusion other than unsubstantiated assertions. Second, the Court does not agree that every term listed in exclusions (1)-(4) must be read as referring only to "construction" related activities.

In reviewing the exceptions listed in Paragraph B(3)(c)(1)-(4), it would be illogical to concluded that they only apply to "construction," as exceptions (2) and (3) explicitly reference "construction" as an excluded item. Had Paragraph B(3)(c) been intended to solely apply to actions undertaken during some form of "construction," the inclusion of the term "construction" within exceptions (2) and (3) would be unnecessary and with no effect. As such, the Court finds that when reviewing Paragraph B(3)(c) in its entirety it can only be reasonably concluded that said paragraph attempts to broadly define various activities undertaken by the insured which are to be excluded under the definition of "Cause of Loss."

As a result of the Court's holding concerning the scope of Paragraph B(3)(c) in the "Cause of Loss - Special Form," the Court must next consider if Shihadeh's cleaning and cutting of Plaintiffs' rugs are within the scope of said exclusions. In

reviewing exclusion (2) of Paragraph B(3)(c) it is clear that it applies to several activities, including faulty, defective, or inadequate "workmanship." Workmanship is defined as "the quality of something made." See American Heritage Dictionary 929 (3d ed. 1994). Further, exclusion (4) applies to faulty, defective, or inadequate "maintenance." Maintenance is defined as "[t]he upkeep or preservation of condition of property, including cost of ordinary repairs necessary and proper from time to time for that purpose." See Black's Law Dictionary 953 (6th ed. 1990).

In considering the meaning of "workmanship" and "maintenance," it is quite clear that the cutting of Plaintiffs' rugs to a specified size, falls within the definition of "workmanship" when Plaintiffs allege that such service was performed inadequately or defectively. The quality and manner in which a service is completed embodies the very essence of "workmanship." Further, rug cleaning squarely falls within the definition of "maintenance," as it is obvious that one cleans rugs to preserve their condition. As such, the Court concludes that the cutting and cleaning activities of Shihadeh, falls within the meaning of "workmanship" and "maintenance," and are thereby excluded as a "Cause of Loss."

Finally, Plaintiffs claim that the "Cause of Loss" exclusion is inapplicable because it fails to make any reference to "personal property" as stated in the "Mercantile" extension.

Plaintiffs, however, fail to consider that Paragraph B(3)(c) goes beyond the scope of "personal property" or "real property," as it clearly and unambiguously applies to "**any** property on or off the described premises." (See Cause of Loss ¶ B(3)(c) (emphasis added)) As such, the Court finds that the scope of Paragraph B(3)(c) by its very terms unambiguously incorporates "personal property."

B. Defend and/or Indemnification and Bad Faith

As previously discussed, an insurer owes a duty to defend an insured whenever the allegations in a complaint, taken as true, set forth a claim which potentially falls within the coverage of the policy. See Visiting Nurse Ass'n of Greater Phila., 65 F.3d at 1100. In this matter, as the Court has conclusively determined that Plaintiffs state no claim which may potentially be covered by Defendant Shihadeh's commercial insurance policy, there can be no requirement to defend or indemnify. As such, the court finds that Transcontinental is under no obligation to indemnify or defend its insured concerning this matter.

Lastly, Plaintiffs assert, without citing any supporting statute, that Defendant Transcontinental acted in "bad faith" in denying Plaintiffs' claim and is therefore subject to punitive damages. (See Declaratory Cmpl. ¶ 16). However, given the Court's holding that Transcontinental is not required to indemnify or defend Shihadeh under the terms of the "Commercial General Liability" form or the "Building and Personal Property" form,

Plaintiffs' bad faith claim must fail. As such, the Court dismisses Plaintiffs' bad faith claim with prejudice.

An appropriate Order follows.

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CNA INSURANCE COMPANY, SHIHADEH CARPETS, INC., SHIHADEH CARPET, RUGS, WOOD, VINYL, and PETER L. SHIHADEH	:	NO. 98-3488

ORDER AND DECLARATORY JUDGMENT

AND NOW, this 20th day of January, 2000, upon consideration of Plaintiffs' Motion for Summary Judgment (Docket No. 19), Defendant Transcontinental Insurance Company's Motion for Summary Judgment (Docket No. 17), and any opposition thereto, IT IS HEREBY ORDERED that:

(1) The Clerk of Court shall correct the caption in Civil Action Number 98-3488 to remove "CNA INSURANCE COMPANY" and replace it with "TRANSCONTINENTAL INSURANCE COMPANY";

(2) Plaintiffs' Motion for Summary Judgment (Docket No. 19) is **DENIED**;

(3) Defendant Transcontinental Insurance's Motion for Summary Judgement (Docket No. 17) is **GRANTED**;

(a) Transcendental Insurance Company has no duty to defend or indemnify Shihadeh Carpets, Inc.,

Shihadeh Carpet, Rugs, Wood, Vinyl, or Peter L. Shihadeh with regard to the Complaint and Counterclaim brought by Richard and Jeanne DiLoreto in the Chester County Court of Common Pleas under docket numbers 93-10154 and 93-10464; and

(b) Plaintiffs' bad faith claim as raised in its Declaratory Judgment Complaint is dismissed with prejudice.

BY THE COURT:

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HERBERT J. HUTTON, J.